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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1347~~ 122

CUSTER CHANNEL WING CORPORATION

and

WILLARD R. CUSTER, *Petitioners,*

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

KEITH L. SEEGMILLER
Premier Building
1725 Eye Street, N.W.
Washington, D. C. 20006
Counsel for Petitioners

Of Counsel:

VINCENT L. GINGERICH
7000 Carroll Avenue
Takoma Park, Maryland 20012

May 1967

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Custer Channel Wing Corporation and Willard R. Custer, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on April 3, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals issued April 3, 1967 is unreported as yet and is printed in Appendix A, *infra,* pp. 1a-14a. The opinion and order of the District Court for the District of Maryland entered November 12, 1965 is reported at 247 F. Supp. 481 and is printed in Appendix B, *infra,* pp. 15a-53a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1967 (Appendix A, *infra*, p. 15a). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether a person is required at his peril to determine the scope of a penal statute reasonably open to opposing interpretation.

2. Whether a person can be held in criminal contempt for wilfully violating the restraining order of the Court when the order does not clearly delineate whether the defendants' conduct was permitted or restrained.

3. Whether there was an abuse of discretion, in a non-jury case, in sentencing petitioner for criminal contempt to 183 days imprisonment for violating an injunctive order of the District Court restraining him from sale of stock except private sale when the facts in this case make it one of original interpretation by a court.

STATUTORY PROVISIONS INVOLVED

Section 4(1) of the Securities Act of 1933, 15 U.S.C. Section 77d(1) (1958), as amended, 15 U.S.C. 77d(2) (1964):

> 77d. Exempted transactions.
>
> The provisions of Section 77e of the title shall not apply to .....
>
> • • •
>
> (2) transactions by an issuer not involving any public offering
>
> • • •

STATEMENT OF THE CASE

Petitioners were convicted of criminal contempt for violating an injunction issued by the District Court. The corporate petitioner was fined $5,000 plus one-half of the costs and the individual petitioner was sentenced to serve 183 days in prison and to pay one-half of the costs.

On May 25, 1962, the District Court permanently enjoined petitioners from engaging in acts or practices that would constitute a violaiton of the registration requirements of Section 5 of the Securities Act of 1933, 15 U.S.C., Sect. 77e(a) and 77e(c) (1958). Exempted from the registration requirement, and hence from the injunction, are certain types of transactions listed under Section 4(1) of the Securities Act of 1933, 15 U.S.C., Sect. 77d(1) (1958), as amended, 15 U.S.C. 77d(2) (1964), among them "transactions by an issuer not involving any public offering."

After the issuance of the order of the District Court on May 25, 1962, petitioners sold stock to a limited number of persons who, before making the purchase, signed an investment letter acknowledging that he knew that the stock was not registered; that the sale was initiated by his application to the corporation; that he had become informed to the extent he desired; that he knew the corporation was enjoined from certain sales of stock; that he was allowed unlimited access to all the corporation's records; that he had all the information he required for his purchase; and that he agreed not to resell the stock for a period of 13 months (see Appendix B, *infra*, p. 18a, footnote 2) From May 25, 1962 to the date of the opinion of the District Court on November 12, 1965, no transferee had requested permission of the corporation to sell the stock. The corporation's transfer agent was directed not to transfer any of this stock on the books of the corporation and each certificate issued contained a recitation on the face

that transfer of it was restricted (see Appellants' Appendix p. 51).

After a lengthy non-jury trial, the District Court concluded that within the meaning of the statute the sales of stock by petitioners were not private sales but sales involving a public offering. As the opinion of the District Court reflects, the controlling issues resolved were issues of law, that is, of statutory construction, and these legal issues were ones of first impression.

The Court of Appeals affirmed the judgment of the District Court on April 3, 1967.

REASONS FOR GRANTING THE WRIT

1. The decisions of the Courts below are probably in conflict with applicable decisions of this Court.

This Court has previously held that a citizen should not be required to construe penal provisions of law at his peril in *Connally* v. *General Const. Co.*, 269 U.S. 385 (1925), in adopting, with approval, the following language in *United States* v. *Capital Traction Co.*, 34 App. D.C. 592, 19 Ann. Cas. 68, this Court stated:

> ". . . The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

The District Court found, and the Court of Appeals affirmed, that the petitioners were guilty of selling un-

registered stock in a manner involving a public offering contrary to Section 5 of the Securities Act. The statute does not define a public offering or a private offering and no attempt has been made to judicially formalize it. Hence, to this day, what is a private or a public offering is open to interpretation.

The Securities and Exchange Commission has listed indices of a "Non-Public Offering Exemption" in its Release No. 4552 of November 6, 1962 (see Appellee's Appendix R9-R-15) based upon its interpretation of the decisions of the courts including the decision of this Court in the case of *SEC* v. *Ralston Purina Co.*, 346 U.S. 119 (1953). Petitioners in the present case substantially complied with all of the requirements for a "non-public offering", namely, (1) limited number of transferees, (2) investment letter, i.e. purchasing for investment rather than resale, (3) restriction of transfer and (4) notice of restriction placed on the certificates.

This Court in the Ralston Purina case, *supra,* pointed out that the registration requirement of the statute was designed to protect the unsophisticated investor who was not able to fend for himself. Petitioners' sales in this case were to experienced and sophisticated investors.

2. The facts in this case present a question of first impression in the interpretation of what constitutes a transaction "by an issuer not involving any public offering" under Section 4(1) of the Securities Act of 1933, 15 U.S.C. Sect. 77d(1) (1958), as amended, 15 U.S.C. Sect. 77d(2) (1964), and raises a significant problem in corporate financing—whether and to what extent a small business corporation must go to the expense of first registering its securities with the Securities and Exchange Commission before selling them to a limited number of persons for investment. Without this Court interpreting the scope of private offering, the small business corpora-

tion will continually make corporate decisions and unintentional blunders as to sale of a limited volume of its securities at its peril unless it first goes to the expense of filing a registration statement with the SEC. Delay in approval can cause needless economic hardship to these corporations.

3. The sentence of the individual petitioner of imprisonment for 183 days is probably in conflict with the decision of this Court in *Cheff* v. *Schnackenberg,* 384 U.S. 373, in which it was stated:

> "Therefore, in the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof. Nothing we have said, however, restricts the power of a reviewing court, in appropriate circumstances, to revise sentences in contempt cases tried with or without juries."

It is readily observable that 183 days exceed this six months maximum.

Moreover, the imposition of sentence of 183 days in prison is so excessive under the facts of this case as to constitute an abuse of discretion, particularly since, as reflected by the opinions of the courts below, there was no finding of fraud, misappropriation of funds, dissatisfaction of any purchaser or other element connoting evil purpose, overreaching or other unfairness.

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

KEITH L. SEEGMILLER
Premier Building
1725 Eye Street, N.W.
Washington, D. C. 20006
Counsel for Petitioners

Of Counsel:

VINCENT L. GINGERICH
7000 Carroll Avenue
Takoma Park, Maryland 20012

May 1967

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,399.

UNITED STATES OF AMERICA, *Appellee,*

versus

CUSTER CHANNEL WING CORPORATION and
WILLARD R. CUSTER, *Appellants.*

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Harrison L. Winter, District Judge.

(Argued February 8, 1967. Decided April 3, 1967.)

Before SOBELOFF, BOREMAN and BRYAN, Circuit Judges.

Vincent L. Gingerich (Keith L. Seegmiller on brief) for Appellants, and Richard M. Phillips, Special Assistant United States Attorney, (Thomas J. Kenney, United States Attorney, and Roy Nerenberg and Clarence E. Beaver, Attorneys, Securities and Exchange Commission, on brief) for Appellee.

SOBELOFF, Circuit Judge:

Appellants, Custer Channel Wing Corporation and Willard R. Custer, its president, were convicted of criminal contempt for violating an injunction issued by the District Court, permanently enjoining them from engaging in acts or practices that would constitute a violation of section 5 of

the Securities Act of 1933, 15 U.S.C. §§ 77e(a) and 77e(c) (1958). This Act forbids the use of any means of interstate commerce or of the mails to sell or offer to sell securities without having first filed a registration statement with the Securities and Exchange Commission. Exempt from the registration requirement, and hence from the injunction, are certain types of transactions listed under section 4(1) of the Securities Act of 1933, 15 U.S.C. § 77d(1) (1958), as amended, 15 U.S.C. § 77d(2) (1964), among them "transactions by an issuer not involving any public offering." Appellants admitted having sold unregistered shares of Channel Wing stock, but maintained that the sales were a private offering within the section 4(1) exemption. They further contended that even if it was a public offering, there was no evidence of "willful" violation of the court's injunctive order, as required for a finding of criminal contempt.

The District Court decided both contentions against the appellants and fined the corporate defendant $5,000 plus one-half of the costs, and sentenced the individual defendant to serve 183 days in prison and to pay one-half of the costs.

After the issuance of the injunction on May 25, 1962, the appellants sold 1,579,590 shares of Channel Wing Class B Common Stock, none of which was registered with the Securities and Exchange Commission. Well over half of the shares were issued to three "Associates" set up by appellants, and the remainder were issued and sold to various individuals, at least nineteen in number. The manner in which the "Associate" device operated is explained in detail in the opinion of the District Court,[1] which found that the "Associates" were not corporations, partnerships, or associations, but merely names used as conduits for the sale of stock to some 136 individuals.

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[1] 247 F. Supp. 481, 486 (D. Md. 1965).

I

The question whether the sale of Channel Wing stock was a public offering, required to be registered with the Securities and Exchange Commission, or a private offering exempted from registration by section 4(1), is controlled by the Supreme Court's decision in *SEC* v. *Ralston Purina Co.*, 346 U.S. 119 (1953). There, the Securities and Exchange Commission sought to enjoin Ralston Purina Company's offerings of unregistered stock to its employees, and the problem before the Court was to determine the scope of the private offering exemption of section 4(1). Since "public offering" is not defined in the Securities Act, the Court looked to the purpose of the Act, which it declared was "to protect investors by promoting full disclosure of information thought necessary to informed investment decisions." 346 U.S. at 124. Interpreting the section 4(1) exemption in the light of this statutory purpose, therefore, the Court expressed the view that a transaction is exempt when the particular class of offerees had "access to the same kind of information that the Act would make available in the form of a registration statement." *Id.* at 125-26. The Court thus made it clear that only where an offering is "to those who are shown to be able to fend for themselves" may the transaction be deemed a private offering.

In the present case the District Court found that none of the purchasers of Channel Wing stock had access to the kind of information that would have become available to them through a registration statement. Applying the *Ralston Purina* test to the sale of Channel Wing securities, it is evident that the transaction was a public offering.

Appellants argue that the District Court erred in finding that the individual purchasers were not able "to fend for themselves," noting that they were "sophisticated investors" and "businessmen of mature experience." But "sophistication" is not a substitute for "access to the kind of information which registration would disclose." 364

U.S. at 127. Schedule A of the Securities Act, 15 U.S.C. § 77aa (1958), lists 32 categories of information that should be included in a registration statement.[2] This type of information is designed to protect the investor by furnishing him with detailed knowledge of the company and its affairs to make possible an informed investment decision. A purchaser of unregistered stock must be shown to have been in a position to acquire similar information about the issuer.

Since section 5 is for the protection of the public, the terms of the exemption must be strictly construed against the one claiming it, and the burden of establishing the exempt character of the transaction rests on him who claims the exemption.[3] It is evident that appellants failed to meet this burden since the District Court found, with full support in the record, that most of the individual purchasers "were not furnished, nor did they have, anything more than the vaguest information about the financial affairs of Channel Wing." 247 F. Supp. at 487. Even the few purchasers shown by the evidence to have gained access to the pertinent information when they later became directors of the corpo-

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[2] Some of these categories are: the nature and general character of the issuer's business; its capital structure; the remuneration to be paid to the issuer's directors and to its officers and other employees, and the nature and extent of their interest in any property acquired; an estimate of the net proceeds to be derived from the security offered; amounts, itemized in "reasonable" detail, of expenses incurred in connection with the sale of the security; a detailed balance sheet of the assets and liabilities of the issuer certified by an independent public or certified accountant; a profit and loss statement of the issuer showing earnings and income; the names and addresses and a copy of the opinions of counsel who have passed on the legality of the issue; and a copy of the issuer's articles of incorporation and of its by-laws.

[3] SEC v. Ralston Purina Co., 346 U.S. 119 (1953); SEC v. Culpepper, 270 F. 2d 241 (2d Cir. 1959); Gilligan, Will & Co. v. SEC, 267 F. 2d 461 (2d Cir. 1959); United States v. Attaway, 211 F. Supp. 682 (W.D. La. 1962); SEC v. Mono-Kearsarge Con. Min. Co., 167 F. Supp. 248 (D. Utah 1958).

ration, lacked such access at the time they purchased most of their stock. Furthermore, since the District Court found that the "Associates" were not "legal entities," but merely conduits for the sale of stock to numerous individuals, none of whom had any connection with Channel Wing, it is clear that these 136 investors also were without access to the type of information required by Schedule A.[4]

A further contention advanced by the appellants is that *Ralston Purina* does not apply where the securities are held for investment, where resale is restricted, and where the number of transferees is limited, since in that case the company offered its stock to hundreds of "key employees" without imposing any restriction on immediate resale. Channel Wing and its president required each prospective purchaser to sign an investment letter acknowledging that he knew that the stock was not registered and that the corporation had been enjoined from certain stock sales, and included an agreement that the purchaser would not resell the stock for a period of 13 months.[5] Appellants also caused a legend to be imprinted on the face of each certificate restricting transfer. They assert that these steps having been taken, the transactions were a private offering.

We think that the appellants misconceive the function of these measures. Although such precautions are taken by issuers relying on the exemption of section 4(1) to ensure that their purchasers shall not in turn distribute securities to others who might not have "access to the kind of information which registration would disclose," even though the initial purchasers possessed such information, "these are only precautions [to prevent illegal distributions] and

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[4] The evidence disclosed that not even the three "Associates" were given or had access to the kind of information that would have been available to them in a registration state.

[5] A copy of the investment letter used by the corporation is set out in footnote 2 of the District Court's opinion. 247 F. Supp. at 485.

are not to be regarded as a basis for exemption from registration."[6] The signing of an investment letter and the imprinting of a legend on the stock certificates are not sufficient to constitute the Channel Wing offering a private one in the absence of proof that the purchasers actually had access to the kind of information that a registration statement would have disclosed.

Appellants' contention that the number of transferees must be considered in determining whether an offering is public or private, and that *Ralston Purina* is distinguishable from the present case by the fact that Ralston Purina's offering was made to hundreds of its employees scattered over a large part of the country, is refuted by the Court's opinion in that very case, which declared that "the statute would seem to apply to a 'public offering' *whether to few or many.*"[7] 346 U.S. at 125. (Emphasis

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[6] Non-Public Offering Exemption, SEC Securities Act Release No. 4552, Nov. 6, 1962.

[7] In Gilligan, Will & Co. v. SEC, 267 F. 2d 461 (2d Cir. 1959) it was argued that an exception to the standard announced in *Ralston Purina* should be made for cases in which the number of offerees or purchasers is small; in *Gilligan* there were only four purchasers. Judge Lumbard, speaking for the court in *Gilligan*, defined the *Ralston Purina* standard as follows:

> "[T]he governing fact is whether the persons to whom the offering is made are in such a position with respect to the issuer that they either actually have such information as a registration [sic] would have disclosed, or have access to such information."

267 F. 2d at 466. He noted that in adopting this test for determining whether an issue is a public offering, "the Ralston Purina case *clearly rejected a quantity limit* on the construction of the statutory term." *Id.* at 467. (Emphasis supplied.)

As early as 1935, the Commission stated that:

> "in no sense is the question [what constitutes a public offering] to be determined exclusively by the number of prospective offerees."

SEC Securities Act Release No. 285, Jan. 24, 1935.

supplied.) Moreover, since the District Court justifiably found that the "Associates" could not be considered "legal entities," the sale of shares was in fact not restricted to a limited group. The total number of purchasers was more than 150 and the government's exhibits indicate that Channel Wing stock was offered to at least seventy others during the same period.[8]

II

Both in the District Court and here the appellants have vigorously insisted that for them to be adjudged in criminal contempt, it is not enough to show that they intentionally committed the acts constituting the violation with full knowledge of all relevant circumstances; there must, it is argued, also be proof beyond a reasonable doubt of "evil purpose or bad motive on their part," that is, "proof of specific intent to violate the injunction."

Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e (1958), provides that it is unlawful to utilize any means of interstate commerce or the mails to sell or offer to sell unregistered securities. Section 24 of the Act, 15 U.S.C. § 77x (1958), makes it a crime "willfully" to violate section 5.[9] The Supreme Court has said that the word "willfully" does not necessarily mean done with a bad purpose, but may be

> "employed to characterize a thing done without ground for believing it is lawful, * * * or conduct marked by

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[8] "[The number of offerees] does not mean the number of actual purchasers, but the number of persons to whom the security in question is offered for sale. The word 'offering' in this sense should not be limited to those cases wherein a formal proposal for a firm commitment is submitted. Any attempt to dispose of a security should be regarded as an offer."

SEC Securities Act Release No. 285, Jan. 24, 1935. See SEC v. Howey Co., 328 U.S. 293, 301 (1946).

[9] 77x. Penalties

"Any person who willfully violates any of the provisions of this subchapter, * * * shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both."

careless disregard whether or not one has the right so to act * * *."

United States v. *Murdock*, 290 U.S. 389, 394-395 (1933).

A number of courts have indicated that in criminal prosecutions for violation of section 5, it is not necessary to prove specific intent to violate the law. All that need be shown to sustain a conviction is that the defendant has intentionally sold or offered to sell unregistered securities through the mails or in interstate commerce.[10] It has also been held that an injunction may be granted for a violation of section 5

> "even though it is not demonstrated that the violations or threatened violations furnishing its basis are wilful in the special sense of being fraudulent, in bad faith or with deliberate intent to violate known requirements of law. * * * [E]ven though violations fall short of those that would be wilful in a criminal sense, the Court may infer from a wanton or even careless willing-

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[10] In Kistner v. United States, 332 F. 2d 978 (8th Cir. 1964), it was pointed out that to sustain a conviction under section 5

> "the Government must prove *only* that the defendant caused to be carried in the mails a security unregistered with the Security and Exchange Commission,"

distinguishing this from the proof required under section 17 of the Act, 15 U.S.C. § 77q: that "the defendant *with intent* committed a fraud." *Id.* at 981. (Emphasis supplied.) See also Estep v. United States, 223 F. 2d 19 (5th Cir.), *cert. denied* 361 U.S. 896 (1955); Stone v. United States, 113 F. 2d 70 (6th Cir. 1940). A district court in the Third Circuit has ruled even more explicitly that

> "it was sufficient to establish that the defendants willfully and intentionally sold or delivered unregistered securities by use of the mails. * * * [I] do not now conceive an element of the crime charged * * * [violation of section 5] to be actual knowledge that a security was being sold in violation of the law."

United States v. Sussman, 37 F. Supp. 294, 296 (E.D. Pa. 1941).

> ness to take a chance on the legality of questionable transactions that a defendant is about to similarly violate the Act if afforded an opportunity to do so * * *."

SEC v. *Mono-Kearsarge Con. Min. Co.*, 167 F. Supp. 248, 261 (D. Utah 1958). See 16 U.S.C. § 77t (1958). Clearly, if in a direct criminal prosecution or in a proceeding for injunctive relief, it is sufficient to show that the act of selling unregistered stock was willful and intentional, without the necessity of showing evil purpose or bad motive with specific intent to violate the law, no more stringent test of guilt should be required in a proceeding for criminal contempt for violation of an order enjoining the defendant from engaging in acts forbidden by the statute.[11]

Appellants argue, however, that other cases, while not expressly requiring a showing of evil motive with specific

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[11] Similar rulings have been made in respect to violations of injunctions involving other federal regulatory statutes. See United States v. Schlicksup Drug Co., 206 F. Supp. 801 (S.D. Ill. 1962), holding that in a proceeding for criminal contempt for violating an injunction restraining defendant from delivering into interstate commerce adulterated drugs in violation of the Federal Food, Drug, and Cosmetic Act, § 301(a), 21 U.S.C. § 331(a) (1958), the government need not prove specific intent to violate the injunction. The court reasoned that there is an "interrelationship between the criminal remedial provisions of the Act and a contempt proceeding growing out of the violation of a remedial order based upon the Act." *Id.* at 805. Since adulteration of drugs could be enjoined without proving any specific intent, it would be "anomalous" to require proof of specific intent in continued violations of the Act, and in violation of an injunction. The court distinguishes United States ex rel. Porter v. Kroger Grocery Baking Co., 163 F. 2d 168 (7th Cir. 1947), which required proof of specific intent in a contempt proceeding for violation of an injunction issued pursuant to provisions of the Emergency Price Control Act, on the ground that specific intent had been held to be an essential element of the criminal sanctions imposed by that statute and that "the contempt proceeding partook of the character of the substantive crimes created by the statute." 206 F. Supp. at 806.

intent to violate section 5 before a "willful" violation may be found, can be read to imply such a requirement. They cite in particular *United States* v. *Crosby*, 294 F. 2d 928 (2d Cir. 1961). This was an appeal by a stock brokerage firm and seven individuals who were found guilty of fraud and conspiracy on a 50-count indictment, in which some of the defendants were charged with willfully and knowingly using the mails to sell stock admittedly unregistered. They contended that there was not the "necessary knowledge" to support the element of willfulness. In discussing this question, the court stated that "there was no evidence that the brokers knew *or should have known* they were 'underwriters' in terms of the Securities Act." (Emphasis supplied.) This language implies that the court was concerned with the sufficiency of the proof of knowledge, rather than with the nature of the intent required by the word "willful."

The later case of *United States* v. *Dardi*, 330 F. 2d 316 (2d Cir. 1964), supports the view that *Crosby* was decided on the basis of insufficient proof of knowledge. Furthermore, the *Dardi* opinion does not discuss the need for proof of specific intent, but says that "the crucial issue as to the broker-dealers' guilt is whether they *knew* that they were selling for a 'control' group." *Id.* at 325. (Emphasis supplied.) Thus, again, the concern appears to be with the necessary knowledge and not with an evil motive or specific intent to violate the law. We think, therefore, that these cases do not cut against those discussed above which indicate that specific intent is not a requisite element of the offense.

At common law, the fundamental concept of crime embraced an element of evil intent, and in the absence of legislative instructions to the contrary, statutory crimes were interpreted as requiring a similar element. *United States* v. *Carll*, 105 U.S. 611 (1881). With the advent of modern economic, industrial, and urban conditions, how-

ever, new statutory crimes—"public welfare offenses"—were created which did not depend on *any* intent as a necessary element, although in the case of certain public welfare offenses, Congress deemed it desirable to make some form of intent an element of the offense.[12] Justice Jackson's opinion in *Morissette* v. *United States,* 342 U.S. 246 (1952), contains a philosophic discussion of the basic element of *mens rea* or evil purpose, and an analysis of the development of a less stringent rule for public welfare offenses. He declined, however, to undertake

> "to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled not static."

342 U.S. at 260.

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[12] A number of regulatory statutes require a "willful" violation to sustain a criminal conviction. This court, speaking through Judge Parker, has held that in a prosecution for a violation of the Elkins Act, 49 U.S.C. § 41 (Supp. 1951), where the maximum penalty is two years' imprisonment or a fine of $20,000, or both,

> "the use in the act of the word 'wilful' does not require that there be an evil intent to commit the offense, but that it is sufficient if the act was done knowingly."

Powell v. United States, 112 F. 2d 764, 767 (4th Cir. 1940). See Armour Packing Co. v. United States, 209 U.S. 56 (1908), quoted extensively by Judge Parker in the *Powell* case. See also United States v. Gris, 247 F. 2d 860 (2d Cir. 1957) [violation of proscription against wiretapping, Sections 501 and 605 of the Communications Act of 1934, 47 U.S.C. §§ 501, 605 (1958)]; United States v. Keegan, 331 F. 2d 257 (7th Cir. 1964) [Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186 (1964)]. In *Gris,* the court held that

> "it matters not whether appellant realized his conduct was unlawful. He knew exactly what he was doing; and what he did was a violation of the Federal Communications Act. He intended to do what he did, and that is sufficient."

247 F. 2d at 864.

Nor is it within the scope of this opinion to lay down a broad rule identifying the laws that make specific evil intent indispensable to the imposition of criminal sanctions. It is sufficient for the present purpose to speak more restrictively. The appellants had already breached the law and had been enjoined not to do so again; yet they knowingly repeated the selfsame forbidden acts. It is not consonant with reason, in these circumstances, to demand a more explicit demonstration of an evil mind in order to sustain the conviction for criminal contempt. See *D. H. Roe* v. *United States*, 316 F. 2d 617, 623 (5th Cir. 1963), a prosecution for violation of section 5, holding that the "best proof" of the requisite willfulness "would be a prior conviction [defined by the court to include "other significant judicial actions such as an injunction"] of the very same defendant for acts substantially identical."

The facts cannot possibly be fitted into the pattern of an innocent stumbling into an unintended transgression. The injunction pointedly brought to the defendants' attention their past infraction of the Securities Act and laid down a specific admonitory prescription to guide their future course. As the District Court noted, appellants, thus warned, should have been more than normally careful in their behavior not to repeat the offense.

There is no occasion to adduce further proof of evil intent here for it is immaterial. Even if material, the factual background supplies the proof. The District Court found that the evidence demonstrated beyond a reasonable doubt that appellants had full knowledge of the acts constituting the violations and participated in such acts intentionally. The appellants knew that the individuals purchasing directly from them, as well as those making their purchases through the "Associates," had no access to the type of information concerning the corporation that a registration statement would have disclosed. Although the defendant Custer introduced testimony designed to show unawareness on his part that the purported sales

to the "Associates" were in fact sales to individuals having no contact with the corporation, the District Court found this testimony "totally unworthy of belief." We agree with the District Judge that the documentary evidence, fortified by additional testimonial evidence, clearly permits the finding.[13]

Defendant Custer presents the further contention that a conviction is barred by his alleged reliance on the advice of the corporation's lawyer, his now deceased brother, that the sale of Channel Wing stock was not a public offering. Elsewhere we have held that reliance on legal counsel may be considered in determining the question of good faith, but does not always constitute a complete defense. *Linden* v. *United States*, 254 F.2d 560, 568 (4th Cir. 1958).[14] Good faith is a relevant consideration on

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[13] The hollowness of the defense may be illustrated by one example from many in the voluminous correspondence offered in evidence, indicating the nature of the arrangement for sales to the "Associates." A letter to Custer from Bruce Wallace, one of the three "Associates," transmitting checks totaling $63,550 for the purchase of 154,000 shares of stock, named nineteen persons in whose names certificates should be issued, and designated the denominations of the certificates. Custer, in replying, returned some of the checks, referring to them as the checks "I talked with you about * * * which cannot be accepted by this Corporation." Custer went on to instruct Wallace to "Please handle this matter of the enclosed check as per our phone conversation, along with any additional friends who become part of the Bruce Wallace Associates in one personal check." This evidences Custer's knowledge of the acts constituting a violation. The District Court was warranted in concluding that appellants realized that if they sold directly to individuals, instead of through the "Associate," the violation would become manifest, and that the "Associate" device was a bald attempt to evade the injunction.

[14] "As a general rule, reliance on the erroneous advice of competent counsel will not relieve an individual of his responsibility for acting in accordance with court orders, and will not enable him to escape conviction and punishment for contempt if he disregards the orders."

Note, *Reliance on Advice of Counsel*, 70 Yale L.J. 978, 992 (1961).

an issue of specific intent where a pertinent inquiry would be whether defendant acted with bad motives. *Bisno* v. *United States,* 299 F.2d 711, 719 (9th Cir. 1962); *Licavoli* v. *United States,* 294 F.2d 207 (D.C. Cir. 1961). See also *SEC* v. *Culpepper,* 270 F.2d 241 (2d Cir. 1959).

In any event, the District Court in our case found as a fact that the defendants did not in good faith rely upon the advice of counsel, for they sold and issued stock to persons far in excess of the maximum number cautiously advised by the lawyer.[15]

It has been asserted, and we assume, that in this instance the stock sales were undertaken without intent to defraud the purchasers, but in a desperate endeavor to save a business from failing for lack of sufficient capital. Doubtless this is a proper consideration in assessing the penalty; it constitutes no defense.

The judgment of the District Court is

Affirmed

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[15] "The first prerequisite to successful invocation of the defense of advice of counsel is that the advisee must follow the advice of his attorney without variation."

Note, *Reliance on Advice of Counsel,* 70 Yale L.J. 978, 979 (1961).

In oral argument, it was pointed out that if despite the defendants' past experience as violators of § 5 and the consequent injunction, they still entertained a good faith doubt as to the application of the registration requirements to their activities, they could have obtained an advisory opinion letter from the Commission. They made no attempt to do so.

Judgment of Circuit Court of Appeals

(Caption omitted)

JUDGMENT

APPEAL FROM the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby affirmed.

/s/ SIMON E. SOBOLOFF
United States Circuit Judge

Filed April 3, 1967
MAURICE S. DEAN, *Clerk*

APPENDIX B

UNITED STATES DISTRICT COURT
D. MARYLAND

UNITED STATES OF AMERICA, *Plaintiff*

v.

CUSTER CHANNEL WING CORPORATION
and
WILLARD R. CUSTER, *Defendants*

Misc. A. No. 399

Nov. 12, 1965

[Filed November 12, 1965]

Miscellaneous Action No. 399

Opinion

THOMAS J. KENNEY, Esq. United States Attorney, ROBERT W. KERNAN, Esq. Assistant United States Attorney, and CLARENCE E. BEAVER, Esq. Attorneys for Plaintiff. VINCENT

L. GINGERICH, ESQ. and KEITH L. SEEGMILLER, ESQ. Attorneys for Defendants.

WINTER, District Judge:

By final judgment in Civil No. 13500, entered May 25, 1962, defendants, Custer Channel Wing Corporation (hereafter called "Channel Wing") and Willard R. Custor (hereafter called "Custer"), were permanently restrained and enjoined from directly or indirectly making use of any means or instruments of transportation or communication in interstate commerce, or of the mails, to offer to sell or sell the capital stock of Channel Wing unless and until a registration statement had been filed with the Securities and Exchange Commission in regard thereto. Excepted from this main command were any securities exempted by § 4(1) of the Securities Act of 1933, as amended, 15 U.S.C.A. § 77d(1), from the necessity of registration. Thus, defendants were enjoined from using the means of interstate commerce and from using the mails to sell stock of Channel Wing as part of a public offering, but were not so prohibited if such sales were part of a private offering.

On April 14, 1965 the United States of America, acting at the instance of the United States Attorney for the District of Maryland and the Securities and Exchange Commission, filed an application to institute contempt proceedings against the defendants. On the basis of allegations showing reasonable cause to believe that the injunction may have been violated, an order to show cause was entered. Defendants responded, alleging that they had sold no securities in violation of the May 25, 1962 injunction, since all sales had been made for investment only, at private sale and under circumstances not involving any public offering. The matter was set down for hearing. Extensive testimony on behalf of plaintiff and on behalf of defendants has been heard and numerous exhibits on behalf of both parties were admitted. The case has been argued and submitted for decision.

Since May 25, 1962 to and including February 16, 1965, 1,579,590 shares of Class B common stock of Channel Wing

have been issued and sold. Channel Wing realized a sum in excess of $400,000 as a result thereof. No registration statement was in effect during any portion of this period.

Of total sales, 225,567 shares, in the aggregate, were issued from time to time to "J. Ben Parent Associates," 397,581 shares, in the aggregate, were issued from time to time to "Bruce Wallace Associates," and 163,294 shares, in the aggregate, were issued from time to time to "Ward Brooks Associates." The balance of the stock was issued and sold to various individuals.[1] The issuance of all of

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[1]

Date	Number of Shares	Name in Which Issued
6/ 4/63	77,000	Edward L. and Juanita L. Mortimer
6/ 4/63	1,000	Juanita L. Mortimer, custodian for Edward L. Mortimer, Jr.
6/ 4/63	1,000	Juanita L. Mortimer, custodian for Dona Anne Mortimer
6/ 4/63	1,000	Juanita L. Mortimer, custodian for Denny Lee Mortimer
10/ 8/63	20,000	John M. Hickey
10/ 8/63	21,370	Guy D. Clarke and Lorraine L. Clark
10/ 8/63	200,000	Wayman Cornelson
10/ 8/63	29,720	Earl P. and Mary Grace Zepp
10/ 8/63	45,000	Roy Bishop and Phyrne Bishop
3/10/64	42,000	Harold Sabol and Irene Sabol
6/ 2/64	10,000	Harold Sabol and Irene Sabol
6/18/64	60,000	U. I. Smith
6/25/64	20,000	Wayman Cornelson
7/ 7/64	20,000	Charles A. Myers
7/28/64	10,000	Harold Sabol
7/30/64	36,758	Donovan Beachley
8/ 6/64	38,000	Leroy Bishop and Phyrne Bishop
10/ 2/64	32,000	Robert L. Chamberlin, Jr.
10/29/64	4,000	Robert L. Chamberlin, Jr.
10/29/64	4,000	Harold Sabol and Irene Sabol
12/28/64	30,000	Leo W. Morris
1/11/65	30,000	Charles L. Loomis
1/27/65	30,000	Donald L. Martins and Walter A. Bartel
2/16/65	30,000	Edward W. Kliewer

these shares was approved in writing by Custer, whose written authorization was directed to The Corporation Trust Company, transfer agent for Channel Wing; the stock was issued with the restrictive legend, "Resale or distribution of this stock is restricted. Details available at the office of the issuer," and with regard to most (but not all) of the stock, an investment letter was signed in substantially the form set forth in the margin[2] prior to issuance of the stock.

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[2] "I have this day purchased from the Custer Channel Wing Corporation ..... shares of its Class B Common Stock at 25¢ per share, and paid $..... in cash therefor. I understand that no registration statement is on file with the Securities and Exchange Commission with respect to this stock, and that the Corporation now has no stock with respect to which a registration statement is on file with said commission. This sale was initiated by my application to the Corporation and the Corporation agreed to sell me the stock only upon condition that I become informed to the extent I desire to do so about the Corporation in all and every aspect of its activities, including its litigation during the past few years, part of which I understand has resulted in an order of the Federal Court of Maryland, enjoining the Corporation from certain sales of stock. I am also aware that a Regulation "A" Filing by the Corporation was suspended by the Securities and Exchange Commission in December, 1960.

"The Corporation has allowed me unlimited access to all its books, records, files, plant and personnel to obtain all information about its affairs which I desire. I have made such inquiry as I believe to be desirable for my purpose, and I have obtained all information I regard necessary for my decision to purchase the ..... shares of stock that I have this day purchased.

"In consideration of the sale of said stock to me, I hereby undertake and agree that I will not sell any of said stock within thirteen months from this date.

DATED: HAGERSTOWN, MARYLAND

....., 196...

.....

..... Associates"

Further explanation of sales to "J. Ben Parent Associates," "Bruce Wallace Associates," and "Ward Brooks Associates" is required. J. Ben Parent, Bruce Wallace and Ward Brooks are individuals interested in the financial success of Channel Wing, and the certification and marketing of the aircraft embodying the principles set forth in a patent issued to Custer. J. Ben Parent has never had any formal association with Channel Wing other than that of an investor who was interested in its financial welfare. The same may be said concerning Ward Brooks. Bruce Wallace initially occupied a similar position, but on March 9, 1964, some months after purchases of Channel Wing stock had been made in the name of Bruce Wallace Associates, he became a director of Channel Wing and thereafter participated actively as a director in the management of its affairs. J. Ben Parent Associates, Bruce Wallace Associates and Ward Brooks Associates, respectively, are not corporations, partnerships or associations; they are simply names, devised probably at the instance of a certain Cecil Custer (now deceased), who was a brother of Custer and one of counsel to Custer and Channel Wing.

These names were used as conduits for the sale of stock to other individuals, viz: In the names of J. Ben Parent Associates, Bruce Wallace Associates and Ward Brooks Associates bank accounts were opened and maintained under the direction and control of the individual permitting the use of his name. J. Ben Parent, Bruce Wallace and Ward Brooks actively solicited their friends, neighbors and business acquaintances to purchase Channel Wing stock. Bruce Wallace was aided in his solicitation by Wayman Cornelson, who also later became a director of Channel Wing on March 9, 1964, and Samuel Stoner who had been a director since December 26, 1959. Persons desiring to purchase original issuance stock of Channel Wing would subscribe for their stock by indicating the number of shares they desire to purchase and making a check therefor payable to the "Associate" through whom they desired to

purchase (usually at the price of 25 cents per share). The Associate would then undertake to subscribe to stock of Channel Wing, sign an investment letter therefor, obtain a group of certificates in the denominations for which individual subscriptions had been accepted, endorse the certificate (which bore the restriction on transfer above recited), in blank, and, except in the case of Ward Brooks Associates, deliver the certificates to the persons who subscribed for the stock. By these means J. Ben Parent Associates obtained 29 stock certificates and delivered them to the individual purchasers thereof; Bruce Wallace Associates obtained 89 stock certificates and delivered them to the purchasers thereof; and Ward Brooks Associates obtained 18 stock certificates but, although they were endorsed in blank, did not deliver them to the purchasers thereof. J. Ben Parent resides in Lake Park, Florida; Bruce Wallace resides in Enid, Oklahoma; and Ward Brooks resides in Garberville, California. The mails and instruments of interstate transportation and communication were freely used in effecting the issuance of stock to the individuals named in footnote 1, the "Associates" and persons subscribing through the "Associates" as described above.

Based upon the facts stated and further facts to be found in connection with various points considered in this opinion, plaintiff contends that Channel Wing and Custer have wilfully, in criminal contempt of this Court disobeyed and defied the injunction of May 25, 1962. Plaintiff prays that they be adjudged in criminal contempt of this Court and punished in such manner as the Court may deem proper. The basic questions for determination are whether the sales of stock under the circumstances outlined are in violation of the injunction and, if so whether defendants, or either of them, wilfully participated in or carried out activities in connection therewith such that they should be adjudged in criminal contempt of court.

- I -

The first question to be considered is whether the injunction has been violated, *i.e.*, whether the sale of stock to which reference has been made was a public offering for which § 5 of the Securities Act of 1933 required registration or whether it was a private offering exempt from registration under § 4(1). The proof shows that except for a Regulation A filing, long since revoked, none of Channel Wing's stock has been registered with the Securities and Exchange Commission, either before or after entry of the May 25, 1962 injunction.

The legal answer to what is and what is not a private offering is found in *Securities & Exchange Comm'n.* v. *Ralston Purina Co.*, 346 U.S. 119 (1953). In that case the issuer made treasury stock available for purchase be certain of its key employees. Among those subscribing were employees with the duties of artist, bake shop foreman, chow loading foreman, clerical assistant, copywriter, electrician, stock clerk, mill office clerk, order credit trainee, production trainee, stenographer and veterinarian. The mails and other instrumentalities of interstate commerce were employed to effect the sales. The issuer argued that the transaction was a private offering, exempt from registration, because the offerees were limited to key employees.

After pointing out that the Securities Act nowhere defines the scope of the private offering exemption contained in § 4(1), and that the legislative history of the statute sheds little light on what was meant, the Court adopted as the test of what may be a private offering, "* * * the need of the offerees for the protections afforded by registration." *Id.* at 127. The Court indicated that where it appears that an offering is limited to those persons who are able to fend for themselves, *i.e.*, have access to the type of information that would be made available by a

registration statement, the offering is exempt, as a private offering. But except for this limited circumstance, the offering is public and registration required. In arriving at this result, the Court specifically rejected as the sole test of what is a public offering the number of persons to whom stock was offered, the Court saying, "* * * nothing prevents the Commission, in enforcing the statute, from using some kind of a numerical test in deciding when to investigate particular exemption claims. But there is no warrant for superimposing a quantity limit on private offerings as a matter of statutory interpretation." *Id.* at 125.

Under the test of *Ralston Purina,* the sales of Channel Wing's stock were manifestly a public offering. Among the transferees named in footnote 1, Wayman Cornelson is the only one who is shown by the evidence to have any connection with the corporation. Mr. Cornelson became a director on March 9, 1964 and, presumably, on and after that date he would have had access to the same kind of information concerning Channel Wing that would have been available in the form of a registration statement, but even as to Mr. Cornelson the majority of the stock which he purchased, namely, 200,000 shares, was brought four months prior to the time that he became a director. Among those named in footnote 1, Mr. U. I. Smith and Mr. Harold Sabol both testified in the proceedings. Although they signed investment letters acknowledging that they had unlimited access to all of the books, records, files, plant and personnel of Channel Wing to obtain all the information about its affairs which they desired, and that they had made inquiry and had obtained all information that they regarded necessary for their decision to purchase shares of stock, their testimony was clear that they were not furnished, nor did they have, anything more than the vaguest information about the financial affairs of Channel Wing.

It is not necessary, however, to rest the conclusion that shares of Channel Wing were distributed by public offering solely upon the sales to the persons named in footnote 1. The sales to J. Ben Parent Associates, Bruce Wallace Associates and Ward Brooks Associates were also sales made as a part of a public offering, whether the sales be treated as limited to the three associates in whose name stock certificates were issued, or whether they be treated as sales to the individuals who advanced money to the various associates and who took from them (except from Ward Brooks Associates) certificates of stock endorsed in blank, albeit they bore a legend restricting transfer. This conclusion follows because if J. Ben Parent Associates, Bruce Wallace Associates and Ward Brooks Associates are treated as legal entities, the proof does not show that they had access to the same kind of information that the Act would make available in the form of a registration certificate. Mr. Parent never became a director of Channel Wing and has no connection with Channel Wing except as a stockholder. Ward Brooks never became a director of Channel Wing and had no connection with Channel Wing except as a stockholder. Bruce Wallace became a director on March 9, 1964, but substantial purchases of stock by Bruce Wallace Associates occurred on October 8, 1963.

Moreover, J. Ben Parent Associates, Bruce Wallace Associates and Ward Brooks Associates are not legal entities; they are only names. Hence, the conclusion is inescapable that the sales purportedly to them were actually sales to the individuals who subscribed in the name of one of the Associates, and who furnished the consideration for the share purportedly issued in the name of the Associate. Many of these individuals testified at the contempt hearing, and it appears that they had no connection with Channel Wing such as would give them access to information of the type which the Act would make available in the form

of a registration statement, and they were neither asked to sign, nor did they sign, any investment letter.[3] The mere fact that the certificates of stock which they held were issued in the name of the Associate through whom they had purchased it with a restrictive legend on transfer does not render them any the less the equitable owner thereof where they furnished the consideration for the issuance of that certificate. Channel Wing and its transfer agent seemed to be of this view, because the Assistant Vice President of The Corporation Trust Company testified that after May, 1962 transfer of restricted stock was permitted in one instance because it was a hardship case, *i.e.*, someone badly needed money.

Defendants stress the comparatively limited number of persons to whom stock was issued after entry of the injunction as a factor having significance to establish that the offering after May 25, 1962 was a private one. Of course, defendants treat the three Associates as single entities in advancing this argument, but the Court has found that the Associates were mere conduits for a much larger number of individuals. Furthermore, the number of offerees is significant only as it bears upon whether the character of the group of offerees is private, *i.e.*, whether the group was "* * * the requisite association with and knowledge of the issuer which make the exemption available." SEC Securities Act Release No. 4552 (1962). It is only one of many elements to be considered in making the factual determination that a public offering does or does not exist. SEC Securities Act Release No. 285 (1935);

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[3] A representative group of purchasers through the "Associates" testified. Their testimony, without exception, was that they were not asked to sign, nor did they sign, an investment letter. They demonstrated a lack of knowledge of the financial affairs of Channel Wing, as well as the absence of a tender by defendants, or the "Associates," of such data. To restrict cumulative evidence, the Court limited the number of such witnesses it would hear at the behest of the plaintiff. Defendants offered no contrary proof.

Loss, *Securities Regulation* 653-96 (2d ed. 1961). *e.g., D. F. Berheimer & Co.*, SEC Securities Exchange Act Release No. 7000 (1963) (sale of $175,000 of convertible debentures to 18 of 22 offerees, most of whom were stockholders of the issue, not shown to be entitled to an exemption as a private offering.).

The argument that the number of offerees, whether great or small, is determinative on the issue of public or private offering was specifically rejected in the *Ralston Purina* case. Indeed, in that case the dictum of an English judge to the effect that a single person may be the public if he is intended to be the first of a series of subscribers, but makes further proceedings needless by himself subscribing the whole, is quoted with approval. The test adopted to determine what is public and what is private is whether the offeree is able to fend for himself and, if not able to fend for himself so that the offering becomes public, it makes no difference whether the offerees are few or many.

Defendants also lay great stress on the investment letter, the form of which is set forth in footnote 2. Even if the form of investment letter was signed by each of the persons named in footnote 1, the investment letter is simply evidence of what information was given them and what information they obtained. Two of them, Messers. Smith and Sabol, were offered little and obtained less. Again, the form of investment letter was signed in the name of the three Associates, but the real purchasing public on whose behalf the Associates acted were not aware of, nor were they asked to sign, any investment letter. Even if each offeree were voluntarily furnished the information about the issuer which would have been required for registration, the offering might not then be exempt as private because such a statutory "* * * construction would give each issuer the choice of registering or making its own voluntary disclosures without regard to the standards and sanctions of the Act," and would make the Act's effective enforce-

ment nearly an administrative impossibility. SEC Securities Act Release No. 4552, *supra.*

In order for an offering to fall within the exemption of § 4(1) two conditions must be met. First, the offeree must have such information as registration would have disclosed or have access to such information and, seccondly, the purchasers must take for investment. Loss, *Securities Regulation, supra,* at 665-72. See *Merger Mines Corp.* v. *Grismer,* 137 F.2d 335 (9 Cir. 1943), *cert. denied,* 320 U.S. 794 (1943); *S.E.C.* v. *Mono-Kearsarge,* 167 F. S. 248 (D.C. Utah 1958). The use of an investment letter, as well as other devices, to insure that securities are purchased for investment is discussed in *Non-Public Offering Exemption,* SEC Securities Act Release No. 4552, *supra.* There it is pointed out that an important factor to be considered is whether the securities offered remain in the hands of the initial informed group or whether the initial purchasers are merely conduits for a wider distribution. The distinction is important to the seller because if the initial purchasers acquire securities with a view to public distribution the sellers assumes the risk of possible violation of § 5 and consequent civil liabilities. The release then states:

> "This has led to the practice whereby the issuer secures from the initial purchasers representations that they have acquired the securities for investment. Sometimes a legend to this effect is placed on the stock certificates and stop-transfer instructions issued to the transfer agent. However, a statement by the initial purchaser, at the time of his acquisition, that the securities are taken for investment and not for distribution is necessarily self-serving and not conclusive as to his actual intent. Mere acceptance at face value of such assurances will not provide a basis for reliance on the exemption when inquiry would suggest to a reasonable person that these assurances are formal rather than real. The real additional precautions of placing a legend on the security and issuing stop-transfer orders have proved in many cases to be an effective means of preventing illegal distributions. Never-

theless, these are only precautions and are not to be regarded as a basis for exemption from registration. The nature of the purchaser's past investment and trading practices or the character and scope of his business may be inconsistent with the purchase of large blocks of securities for investment. In particular, purchases by persons engaged in the business of buying and selling securities require careful scrutiny for the purpose of determining whether such person may be acting as an underwriter for the issuer."

It thus appears that a signed investment letter is some evidence that a security is purchased for purpose of investment. Even conclusive evidence of a purchase for purpose of investment, standing alone, however, is not sufficient to render an offering a private one unless the first condition for a private offering has been met, namely, that the purchasers have, or have access to, the type of information that would be disclosed in a registration statement. The record here is conclusive that the persons named in footnote 1, the "Associates" as such, and the persons purchasing through the Associates did not have such information or access to such information. Hence, even if the investment letter with the restriction on stock transfer is treated as conclusive proof of a purchase for the purpose of investment, the legal conclusion is inescapable that the transactions involving stock of Channel Wing since the date of the injunction have been a public offering in violation of the injunction.

- II -

The next aspect of the case to be considered is whether defendants, or either of them, wilfully participated in or carried out activities in connection with the public offering such that they should be adjudged in criminal contempt of court. While counsel for all parties agree that wilfulness is an element of the criminal contempt charged here, they disagree sharply as to what is meant. The plaintiff argues that wilfulness is established if it is shown that the defendants had full knowledge of all of the essen-

tial elements of the public offering. The defendants argue that, additionally, there must be proof of evil purpose or bad motive on their part; in other words, proof of specific intent to violate the injunction. For reasons which will presently appear, the Court concludes that proof of specific intent is not required; it is enough if the evidence demonstrates beyond a reasonable doubt that defendants, or either of them, when performing some overt act, had knowledge of all the facts collectively constituting criminal contempt.

There is little case law having direct bearing on the issue. In essence, the claim that defendants violated the injunction is a claim that defendants violated § 5 of the Act, 5 U.S.C.A. § 77e(a),[4] for which they could be prosecuted under § 24 of the Act, 15 U.S.C.A. § 77x.[5] First

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[4] § 77e. Prohibitions relating to interstate commerce and the mails

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

[5] "77x. Penalties

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both."

to be considered will be the standard of conduct which must be shown to have been violated before the penal sanctions of the Act may be applied.

Morissette v. *United States*, 342 U.S. 246 (1952), although arising on facts quite dissimilar to those of the case at bar, is the modern bible of the circumstances in which proof of criminal or specific intent is an essential element in a successful prosecution. To generalize, the thesis of the case is that the necessity of proof of specific intent is "* * * as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id.* at 250. However, a more recent development of the criminal law is "* * * to call into existence new duties and crimes which disregard any ingredient of intent." *Id.* at 253. Examples of the latter and the needs of society which require recognition of nonintentional criminal conduct are described as follows:

> "The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanism, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of, came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare." *Id.* at 253-54 (emphasis supplied)

As to the latter statutes imposing criminal sanctions for "public welfare offenses," the Court added:

> "* * * whatever the intent of the violater, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonable expect and no more exertion than it might reasonably exact from one who assumes his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime." *Id.* at 256.

The Court nevertheless recognized that even in the area of "public welfare offenses" Congress may see fit to make intent a decisive element of criminal conduct. In this connection, it is significant that the Court, in footnote 23 on page 264 of its opinion, referred to at least three statutes in which use of the word "willfully" was considered to have this effect. Section 24 of the Securities Act of 1933, 18 U.S.C.A. § 77x, under which a prosecution of the defendants for their alleged wrongful conduct in the case at bar would proceed, employs the word "willfully."[6]

Aside from the use of the word "willfully" in § 24 of the Act, there is ample support in the cases for treating the Securities Act of 1933 as legislation having broad remedial purposes and thus in its criminal sanctions to create a class of "public welfare offenses." *Securities & Exch.*

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[6] See text note 5, *supra*.

Com. v. *Joiner Leasing Corp.*, 320 U.S. 344 (1943).[7] See also, *Securities & Exchange Commission* v. *Ralston Purina Co., supra, Wilko* v. *Swan*, 346 U.S. 427 (1953); *Berko* v. *Securities and Exchange Comm'n.*, 316 F.2d 137 (2 Cir. 1963); *Creswell-Keith, Inc.* v. *Willingham*, 264 F.2d 76 (8 Cir. 1959); *Otis & Co.* v. *Securities and Exchange Comm'n.*, 106 F.2d 579 (6 Cir. 1939). There is also support in the congressional history of the Securities Act for the conclusion that Congress intended the Act to be remedial and intended to protect an unsuspecting public from the irresponsibility which had been demonstrated in the distribution of securities prior to the Act's passage in 1933. H.R. Rep. No. 85, 73d Cong., 1st Sess. 1-5 (1933); S. Rep. No. 47, 73d Cong., 1st Sess. 1-2 (1933).

United States v. *Sussman*, 37 F. S. 294 (E.D. Pa. 1941), is apparently the only case which has passed specifically on the issue of what proof of intent is needed to sustain a criminal prosecution for violation of § 5 of the Act. In that case, in ruling on a motion for a new trial, the trial judge remarked, "I did not then and do not now conceive an element of the crime * * * to be actual knowledge that a security was being sold in violation of the law." *Id.* at 296. It should be noted that there was no discussion of the statement, no citation of authority was referred to in support of it and, moreover, the statement was made in a criminal prosecution under the Act as possibly distinguishable from proceedings for a determination of criminal contempt of court.

A decision of the Eighth Circuit, *Kistner* v. *United States*, 332 F.2d 978 (8 Cir. 1964), lends support to the conclusion that a successful prosecution for failure to com-

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[7] Since Mr. Justice Jackson was the author of the opinion of the Court in this case, it would appear that he had this case in mind when, subsequently writing for the Court in *Morissette* v. *United States, supra,* he employed the italicized phrase "and even securities" cited in the text.

ply with § 5 of the Act does not require proof of specific intent. In this case, which arose as a motion filed under 28 U.S.C.A. § 2255, a defendant who had been convicted first of violating § 5 of the Act, 15 U.S.C.A. § 77e (a)(2), and later of violating § 17, 15 U.S.C.A. § 77q(a) (fraudulent interstate transactions) as a result of his activities in the same transaction, claimed that he had been subjected to double jeopardy. Assuming for the purpose of the decision that the question of double jeopardy could be reached on such a motion, the Court concluded that defendant was not twice placed in jeopardy. The Court stated that it was bound to apply the "same evidence" test and, in application of that test, made the following statement:

> "As spelled out in United States v. Attaway, 211 F. Supp. 682, 684 (W.D. La. 1962), the essential facts constituting a crime under § 77e(a) (2) are that '(1) a 'security' was carried through the mails or in interstate commerce, (2) for the purpose of a sale or delivery after a sale, and (3) that *no registration statement was in effect as to such security at the time thereof* * * * .' (emphasis supplied.) Whereas, the *sine qua non* of the crime under § 77q(a) is not the interstate transportation of an *unregistered* security, but the perpetration of a fraudulent scheme upon a duped investor, federal jurisdiction of which is acquired from the incidental utilization of the channels of interstate commerce to transport the misrepresented securities. United States v. Cashin, 281 F.2d 669 (2nd Cir., 1960); United States v. Attaway, supra; United States v. Greenberg, 30 F.R.D. 164 (S.D.N.Y. 1962). Therefore, under the first indictment, the Government must prove only that the defendant caused to be carried in the mails a security unregistered with the Securities and Exchange Commission to sustain a conviction within the meaning of § 77e(a)(2); while proof of a violation of § 77q(a), as charged in the second indictment, demands the quite different evidence that the defendant with intent committed a fraud upon the purchaser of a security by means of an untrue or omitted statement of a material fact or engaged in a course of business designed to deceive the purchaser." *Id.* at 980-81.

The significance of this statement is that intent was not mentioned as an element of the crime under § 77e(a)(2), but was an essential element of the crime under § 77q(a).

These cases, however, should be compared with three appellate decisions of the Second Circuit, which touch upon the concept of wilfulness in prosecutions under the Securities Act of 1933. The first, *United States* v. *Crosby*, 294 F.2d 928 (2 Cir. 1961), arose under complicated and perhaps unique facts. A brokerage firm and its three stockholders were convicted of violating § 5 of the Act, but on appeal their convictions were reversed. Proof showed that the issuer of the securities had given 2,000,000 shares for prospecting permits. Many of these shares were returned to the brokerage firm and sold through it. The defendants knew that the stock was not registered, but they had opinion letters from counsel that registration was not required. By construction of § 4(1) of the Act, the Court concluded that the close question of whether registration was required should be decided adversely to the defendants, but the Court also concluded that, because of lack of clarity in the regulatory scheme, the defendants did not know, nor should they have known, that registration was required. While this conclusion was contrary to the opinion of counsel under which the defendants acted, the Court concluded that counsel's opinion was not so patently erroneous as to permit the jury to speculate on the defendants' good faith.

In the course of its opinion on the aspect of the case with which we are concerned (294 F.2d at 938-43), the Court employed a number of phrases from which it could be argued that its concept of wilfulness required proof beyond a reasonable doubt of evil purpose on the part of the defendants, *i.e.*, a specific intent to violate the Act, but a careful reading of the opinion leads this Court to the conclusion that the case is not direct authority for that rule. In the first place, in the portion of the opinion relevant here, the Court was discussing simultaneously a conspiracy count,

as well as several substantive counts on which the defendants were indicted, so that reference to guilty knowledge and criminal intent may relate only to the conspiracy count, in which guilty knowledge is an element of the crime.

More importantly, an analysis of the Court's opinion indicates that its holding was that the government had failed to prove beyond a reasonable doubt knowledge on the part of the defendants of a fact essential to constitute the commission of the substantive offense on their part. In the case the brokers were claiming an exemption from § 5 on the theory that under § 4(1) they were not underwriters. On an aspect of this contention, the Court found:

> "It is key here that the government nowhere showed that the brokers [defendants] knew the details of the alleged transfer from Gully to Castagna—or that they knew the latter's relation to and probable domination by McCarthy. Thus there was no evidence that the brokers knew or should have known that they were 'underwriters' in terms of the Securities Act." *Id.* at 942.

It was in the context of this finding, then, that the Court, earlier in its opinion, expressed its holding:

> "The proof is clear that no Texas-Adams stock was ever registered—and that defendants knew that the particular certificates involved in Counts 46-8 were not registered. There were, however, opinion letters claiming the shares to be exempt from registration. Two basic elements thus remain: Were the shares exempt? If not, does the record adequately prove the necessary knowledge on the part of these defendants to support the element of wilfulness? We hold that, while the shares have been registered, there was insufficient proof from which the jury legitimately could have inferred wilfulness and criminal intent." *Id.* at 938-39.

It is not clear from the *Crosby* opinion whether the Court would require specific intent to violate the statute and was holding that such specific intent is impossible without knowl-

edge of the factors which constitute the violation, or whether it would conclude that only intent to do the act knowing of the factors which constitute the violation, was required. This Court thus understands *United States* v. *Crosby, supra,* not to decide the threshold question considered in this case, although it did decide at least that knowledge of the factors constituting the violation was required before a wilful violation can be found.

United States v. *Robertson,* 298 F.2d 739 (2 Cir.) dealers knew that they were selling for a "control" case a conviction on two counts of using the mails or instruments of transportation or communication in interstate commerce to sell unregistered certificates was also reversed. The Court, citing *United States* v. *Crosby, supra,* stated that the parties did not appear seriously to contest the claimed insufficiency of the charge to the jury on these counts as to wilfulness judged by the test established in the *Crosby* case, but the opinion fails to disclose what was the charge and, hence, it cannot be determined by this Court that the question facing it was there decided.

United States v. *Crosby, supra,* has also been cited in *United States* v. *Dardi,* 330 F.2d 316 (2 Cir. 1964). Again, broker-dealers were convicted of unlawful sales of unregistered stock. They did not dispute that they sold the stock, or that it was not registered, but they claimed they were ignorant that registration was required. The key to this question was found by the Court to rest in the crucial issue as to whether the broker-dealers knew that they were selling for a "control" group. Overall, the Court concluded that there was sufficient evidence from which the jury could conclude beyond a reasonable doubt that the broker-dealers knew that they were acting for a control group and, hence, the judgments entered on their convictions were affirmed. In arriving at this result, the Court stated, "in *United States* v. *Crosby, supra,* this Court found that there was insufficient evidence that the broker-dealers 'knew or should have known that they were "underwriters" in the terms of

the Securities Act.' The evidentiary problem here is whether the link missing in *Crosby* has been supplied." *Id.* at 325-26. An analysis of the evidence led the Court to conclude that each of the three broker-dealers could probably have been found by the jury to know that the sellers were "control" persons, so that the broker-dealers were "underwriters" and registration was required.

United States v. *Dardi, supra,* thus reinforces this Court's initial reaction that *Crosby* was decided on the basis of insufficient proof of knowledge. More importantly, *Dardi* takes the next step and seems to indicate that specific intent need not be proved beyond a reasonable doubt to sustain a successful prosecution. This conclusion that *United States* v. *Dardi* has this effect stems from the Court's limiting its consideration to the question of knowledge on the part of the broker-dealers of the fact that registration was required and not considering or discussing the need for proof of specific intent.[8] Consequently, it appears to this Court that what *Dardi* requires, and all that *Dardi* requires, to constitute a wilful violation of § 5 of the Securities Act is intentional activity in violation of § 5 with knowledge of all the factors constituting the violation, but not proof of evil purpose. The Court adopts this rule as the proper one in a prosecution for violation of § 5 of the Act.

This conclusion is in harmony with the cases previously cited and discussed. Under this conclusion, actual knowledge that the sale is in violation of the law, the standard rejected in *United States* v. *Sussman, supra,* is not required.

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[8] *Dardi* could be read as saying that the issue of whether the brokers knew they were selling for a "control" group was crucial because once that fact was established, the brokers, who were in the business of handling securities, would have actually known, or would have been bound to know, that they were acting in violation of the statute and *thus specific intent to violate the Act would be implied.* This is an unlikely reading, however, because in affirming the convictions the Second Circuit did not say that it was implying intent.

All that is required is knowledge of all the facts which constitute the violation. This conclusion does no violence to *Kistner* v. *United States, supra*, because that case did not even reach the question of whether knowledge of facts which would make a registration statement required was a prerequisite to establishing a criminal violation of § 5. As previously noted, *United States* v. *Crosby, supra*, and *United States* v. *Robertson, supra*, do not foreclose the question at issue in this case.

The conclusion reached promotes the remedial purposes of § 5 of the Act. It should be noted that, under § 12 of the Act, 15 U.S.C.A. § 77(L), civil penalties may attach to a person who violates § 5, regardless of his intent or knowledge. Such a statutory scheme is in keeping with the remedial purpose of the Act, which is broadly designed to protect the public. A requirement of something less than specific intent or evil purpose to show a criminal violation of the Act is also in harmony with the Act's remedial purpose. At the same time, the conclusion gives meaning to the language in § 24, which requires a wilful violation before penal sanctions may be imposed. A requirement of intent on the part of the accused deliberately to do an act constituting part of the intent with knowledge of all of the other factors constituting the violation distinguishes § 24 from some of the public welfare offenses discussed in *Morissette* v. *United States, supra*, where the mere act may constitute a crime regardless of intent, if it is prohibited by statute and Congress has not included any language such as "wilful" in the penal provisions. *e.g.* 21 U.S.C.A. § 333(a) (Food, Drug & Cosmetic Act).

- III -

The authorities discussed to this point are all cases in which there was a direct prosecution for violation of the Act. The case at bar, however, is a prosecution for a violation of the injunction, and so there must be considered the correlation, if any, between the need for proof of spe-

cific intent, if any, to show a substantive violation of the Act to the need for proof of specific intent, if any, to show a criminal contempt in violation of an injunction. Here again, as with the need to prove specific intent to prosecute successfully under the Act, the decided cases are not conclusive.

In the unreported case of *United States* v. *Wilson-Williams, Inc.*, No. 149-6 (S.D.N.Y. 1961), it was said, by way of dictum, that proof of specific intent was not an essential element of the proof upon a charge of criminal contempt for the violation of an injunction against misbranding under the Food, Drug & Cosmetic Act because that Act does not require such proof in a direct prosecution, and it would be an anomaly to require proof of specific intent in the contempt situation when no such requirement was necessary to prove a criminal violation.

United States v. *Schlicksup Drug Co.*, 206 F. S. 801 (S.D. Ill. 1962), achieved a similar result but on slightly different reasoning. There again, the issue was whether defendant was guilty of criminal contempt in violating an injunction against adulteration of articles of drugs proscribed by the Act. The Court found that defendant had specific intent to violate the injunction, but nevertheless discussed in some detail the necessity of proof of that element. The Court pointed out that in *United States* v. *Dotterweich*, 320 U.S. 277 (1943), it had been held that proof of specific intent under that Act was unnecessary to sustain a prosecution, and that, also under that Act, injunctive relief was available for the purpose of enforcement, as well as criminal sanctions. If injunctive relief were sought, proof of specific intent was not required. The Court stressed the substantial interrelationship between the criminal remedial provisions of the Act and a contempt proceeding arising from the violation of a remedial order based upon the Act. Thus, Chief Judge Mercer concluded, at 805:

> "It would be anomalous, indeed, therefore, to require proof of specific intent in continued violations of the

Act, and in violation of an injunction, before the court which issued the injunction could enforce it by a contempt proceeding. Such a result would not only defeat the purposes of the Act, but it might also sterilize the court's power to compel obedience to its orders."

Possibly *United States ex rel. Porter* v. *Kroger Grocery & Baking Co.*, 163 F.2d 168 (7 Cir. 1947), is a contrary authority. That case was a criminal contempt proceeding for violation of an injunction issued under the Emergency Price Control Act. In clear and unmistakable language, specific intent was an essential element of criminal sanctions imposed by the Act, and the government's petition for a citation for contempt charged knowing, flagrant and wilful disobedience of the injunction. Proof of specific intent was held to be an essential element to sustain a conviction of criminal contempt. The case does recognize, however, as was pointed out in *United States* v. *Ford*, 9 F.2d 990 (D. Mont. 1925), and *Morissette* v. *United States, supra*, that even when specific intent is required, specific intent may be inferred from forgetfulness, neglect or failure of or indifference to duty or consequences.

The power to punish for violation of an injunction enjoining transgression of § 5 of the Act should not be less than the power to enforce § 5 of the Act by criminal sanctions. Both have the same ultimate objective—protection of the investing public—so that a greater quantum of proof or additional elements of proof should not be required in one proceeding as contrasted to the other. The fact that if criminal contempt is found the Court has a relatively unlimited power to punish (18 U.S.C.A. § 401), or that defendants may not be entitled to a jury trial where as here the original injunction was obtained by the United States (18 U.S.C.A. § 3691), do not require a different conclusion. These considerations are outweighed by other factors. An injunction like the original injunction here is granted only because there is a showing, *inter alia*, of more than a remote possibility of future harm. The person enjoined is

put on notice that his past acts have violated the law, and that there is a substantial likelihood of future violation. No concept of basic fairness is violated by requiring a person in this position to be more than normally careful in his future conduct. Moreover, the Court's power to do justice by granting injunctive relief would be seriously embarrassed, if not destroyed, by a requirement of greater proof to show a violation of the injunction than to show a violation of the statute incorporated into its order.

Indeed, reason would support the application of a rule which permits a lesser showing to prove criminal contempt than to show a criminal violation of the Act in the first instance. Like the Pure Food, Drug & Cosmetic Act, the Securities Act of 1933 authorizes entry of the injunction which defendants are charged with violating, without regard to the factor of intent.[9] Such an order, when entered, must be respected. When, as here, the acts constituting an infringement of the injunction, if considered alone, would support the entry of an injunction, the necessity of creating respect for its own order may well lead to the conclusion that a court should not require as much proof to show criminal contempt as to show a basis for original injunctive relief. Ordinarily, the creation of a remedy to redress private wrongs resulting from a violation of an injunction is the object of a proceeding for civil contempt. Under the facts here neither defendant is in a financial position

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[9] § 77t. Injunctions and prosecution of offenses

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(b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States or United States court of any Territory, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond."

to restore the purchasers of 1,579,590 shares of stock to their former status. Remedial action, if any, can be obtained solely from the deterrent effect of criminal sanctions. This is a second factor which would point to the correctness of not requiring as much proof to show criminal contempt as is required to show a substantive violation.

In any event, the Court does not deem it necessary to decide whether criminal contempt may be shown by proof which fails to show a criminal violation of § 5 of the Act, because an analysis of the proof which will follow leads the Court to conclude that defendants actually or vicariously had knowledge of each of the acts constituting a contempt and participated in them wilfully in the sense that they did so intentionally and not inadvertently or accidentally. Thus, the Court concludes that the proof would be sufficient to sustain a prosecution for violation of § 5 of the Act, irrespective of whether an injunction against such violation had been previously entered.

- IV -

In support of this conclusion, the Court now turns to the proof to show the extent of defendants' knowledge and participation in the public sale of 1,579,590 shares of Channel Wing's Class B common stock.

Defendants in their response to the petition to an order adjudging them in criminal contempt admit knowledge of entry of the May 25, 1962 injunction and that thereafter Channel Wing's common stock was not registered with the Securities and Exchange Commission. The extent of defendants' other knowledge must be considered in three separate steps. Defendants pitch their whole defense on lack of knowledge that sales to the "Associates" were in fact sales to persons who subscribed to Channel Wing stock through an Associate. But the extent of defendants' alleged contempt is not so limited by the facts. The Court has already concluded that there was a public offering of Chan-

nel Wing's stock subsequent to the injunction in at least three separate respects, viz., (1) sales to the persons named in footnote 1, (2) sales to the "Associates," and (3) sales to persons for whom the "Associates" were conduits. Defendants' knowledge and participation in each of these groups of transactions must be separately considered.

Defendant Custer, as President of Channel Wing, authorized and directed The Corporation Trust Company to issue the shares of stock sold to the persons named in footnote 1. Thus he, individually and acting on behalf of Channel Wing, was bound to know that the shares had been sold and were being issued. Indeed, in connection with direction and authorization to issue the shares, he certified the consideration therefor, a fact significant to the transfer agent since it was thus able to determine what stock transfer taxes were payable. Subsequently, in each instance, the certificates issued by The Corporation Trust Company were sent to defendant Custer in his capacity as President of Channel Wing. It may be inferred that delivery was then made to the alternate purchasers. Defendant Custer and Channel Wing knew, or had knowledge of facts from which they are presumed to have known, at the time of each transaction that the person to whom the shares were issued and sold was not a person who had actual intimate knowledge of the affairs of Channel Wing or a person who had access to the information that a registration statement would disclose. These persons were manifestly not so closely associated with Channel Wing that they either had intimate knowledge of the corporation's affairs or could command access to information which could give them such knowledge. As a matter of fact, they were not even furnished such information voluntarily.

The same is true with respect to sales to the Associates, except that Bruce Wallace became a director on March 9, 1964, and thereafter may be presumed to have had access to the requisite knowledge of the corporation. As has been

previously mentioned, however, substantial sales to Bruce Wallace Associates were made on or about October 8, 1963.

There remains to be considered the extent to which, if at all, both defendants had knowledge that the Associates were in fact conduits for a substantial number of undisclosed purchasers who subscribed through the Associates. Defendant Custer in his testimony denied flatly that he knew that standing behind the Associates were a large number of people from whom originated the cash consideration for the sales of stock to the Associates. In this respect his testimony was corroborated by the testimony of Wayman Cornelson, who assisted in the solicitation of subscriptions for Bruce Wallace Associates and Bruce E. Wallace. Ward Brooks and J. Ben Parent offered some corroboration also. But the record shows that each of the four named witnesses had testified under oath in an administrative proceeding before a Securities and Exchange Commission examiner to the effect that there had been free and frank discussion between them and defendant Custer about the operation of the "Associate" with which each was connected. Each conveniently forgot, or unconvincingly explained away, such testimony when he appeared before this Court. Messrs. Brooks and Parent were less successful in exhibiting convenient memories, and more disposed to be truthful witnesses than Messrs. Cornelson and Wallace, because Mr. Brooks did acknowledge some of his testimony in the administrative proceedings to be true, and Mr. Parent did admit—although he thereafter subsequently denied—that he had discussed the workings of J. Ben Parent Associates with defendant Custer.

In making this observation about the credibility of these four witnesses, the Court is aware that the portions of their testimony before the S.E.C. examiner which it permitted to be read to them at the instance of the government in an attempt to refresh their recollection are not to be treated

as affirmative evidence.[10] To the extent that the readings of the prior transcripts adversely affect the credibility of these witnesses, the fact remains that the witnesses were called as government's witnesses to assist the government in meeting its burden of proof beyond a reasonable doubt, and impeachment has the effect only of discrediting them but does not convert their testimony into affirmative proof. However, as alibi witnesses for defendants, they are totally unworthy of belief.

Notwithstanding Mr. Custer's denials, and notwithstanding the denials of his four close Associates, other evidence establishes beyond a reasonable doubt that defendant Custer, and through him Channel Wing, knew that purported sales to the Associates were in fact sales to an undisclosed number of individuals having no connection with Channel Wing, other than as investors. A large part of this evidence is documentary; some consists of testimony.

By way of general background, it should be stated that Channel Wing was attempting to manufacture an aeroplane embodying certain concepts of aerodynamics developed by defendant Custer and for which a patent had been issued. The accomplishment of the objective required substantial amounts of cash and substantial investment, and, to state the matter succinctly, Channel Wing was in desperate financial straits, particularly after the injunction entered

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[10] The government did not attempt either to authenticate and offer the transcripts of administrative proceedings, or to press upon the Court the evidentiary rule adopted in the Second Circuit. See *United States* v. *DeSisto*, 329 F. 2d 929 (2 Cir. 1964); *United States* v. *Corsi*, 65 F. 2d 564 (2 Cir. 1933), overruled in *Bridges* v. *Wixon*, 326 U.S. 135 (1945); *DiCarlo* v. *United States*, 6 F. 2d 364 (2 Cir. 1925); McCormick, *Evidence* § 39 (1954); 3 Wigmore, *Evidence* § 1018 (3d ed. 1940). *Contra, United States* v. *Rainwater*, 283 F. 2d 386 (8 Cir. 1960); *Ellis* v. *United States*, 138 F. 2d 612 (8. Cir. 1943); *McCracken* v. *Richmond, Fredericksburg and Potomac R. Co.*, 240 F. 2d 484 (4 Cir. 1957); *Sykes* v. *O'Hearne*, 181 F. Supp. 368 (D. Md. 1960).

May 25, 1962. Channel Wing's need for cash to complete engineering studies and to obtain a certification of its aircraft by federal aviation authorities was the subject of continuous discussion after May 25, 1962. In August, 1962, defendant Custer discussed the money needs of Channel Wing with J. Ben Parent. Tentative agreement to sell 100,000 shares in the aggregate of Channel Wing stock to residents of Palm Beach, Florida was made. The shares were to be sold in blocks of 20,000 at a consideration of $5,000.00 per block. This plan, however, was not successful because purchasers for stock in this quantity were not to be found.

Thereafter, the device of J. Ben Parent Associates was hit upon. Probably the concept originated with Cecil Custer (now deceased), a brother of defendant Custer, and one of counsel for Channel Wing. Once the device had been conceived and put into operation, the proof shows that defendant Custer knew precisely what was going on.

First and foremost, among the evidence indicating knowledge on the part of defendant Custer, and through him on the part of Channel Wing, is the great bulk of correspondence indicating the mechanics by which the stock was issued. In regard to all sales of stock, including sales to J. Ben Parent Associates, defendant Custer, as President of Channel Wing, having an office in Hagerstown, Maryland, would write to The Corporation Trust Company, in Jersey City, New Jersey, authorizing and directing the latter to issue shares as indicated in the letter. In each instance of a sale to J. Ben Parent Associates, or either of the other two Associates when they were established, defendant Custer would designate the number of certificates and denominations thereof to be prepared. Defendant Custer would also certify the sales price for the stock. Typical of such transactions is the first such letter, dated October 16, 1962, in which defendant Custer directs the issuance of 34,000 shares to J. Ben Parent Associates, and specifies "8 certificates of

4,000 each—one certificate of 2,000 shares." Additionally, by letter of January 21, 1963 defendant Custer directed the issuance of 16,000 shares to J. Ben Parent Associates, consisting of "16 certificates of 1,000 shares each;" by letter dated September 27, 1963 defendant Custer directed the issuance *inter alia,* of 84,900 shares to J. Ben Parent Associates, consisting of "34 certificates of 2,000 each—16 certificates of 1,000 each—9 certificates of 100 each," 38,000 shares to Ward Brooks Associates, consisting of "4 certificates of 1,000 each—one certificate of 4,000 each, 3 certificates of 10,000 each," and 123,600 shares to Bruce Wallace Associates, consisting of 2 certificates of 20,000 shares, one certificate of 8,000 shares, 6 certificates of 5,000 shares, one certificate of 4,100 shares, 4 certificates of 4,000 shares, one certificate of 3,000 shares, 3 certificates of 2,000 shares, 2 certificates of 1,500 shares, one certificate of 1,200 shares, 9 certificates of 1,000 shares, one certificate of 600 shares, one certificate of 500 shares, four certificates of 400 shares, two certificates of 200 shares, and 2 certificates of 100 shares. Twenty-two letters of similar vein were written, the details of which will not be recited.

This proof, standing alone, would seem inescapably to indicate that defendant Custer knew that the "Associates" were not ultimate purchasers of Channel Wing stock, but were conduits for distribution to others. But the record shows even more specific proof in this regard, namely, the letters to defendant Custer and Channel Wing concerning the issuance of stock.

In connection with his operation of J. Ben Parent Associates, which was the first of the "Associates" to begin the distribution of stock, Mr. Parent wrote defendant Custer under date of October 18, 1963, sending a check for the issuance of 1,000 shares of stock. He stated that he had had nine certificates in denominations of 100 shares "but it was not enough," and he requested defendant Custer to send ten 100 share certificates. Significantly

he added, "I had several more that wanted stock, but they can buy it through the brokers at a lower price." Three days before, Mr. Parent had transmitted a check and ordered 8,000 shares of stock. After directing that it be made out the same way as "the other Stock that I have purchased," he added "there may be additional purchases, if there is still some of this Stock for sale." In a similar letter under date of June 26, 1963, Mr. Parent made the comment, "I expect several more Checks to come in very soon. I will forward them as they come in." In another similar letter dated September 24, 1963, in which Mr. Parent directed that 12,800 shares of stock for which the consideration was enclosed be issued in 16 certificates of varying denominations, Mr. Parent commented "I am expecting more Checks before the middle of next week." On August 25, 1964, when Mr. Parent transmitted a check for 3,667 shares of stock, he stated that it was his understanding that that amount "cleans up the total Balance" of all of the stock "that I have been selling to myself as well as my good friends."

When Bruce Wallace Associates was devised as a means for selling stock, Mr. Wallace initially did not understand how Bruce Wallace Associates should operate. By letter dated June 22, 1963 Mr. Wallace transmitted checks totaling $63,550.00 for the purchase of 154,000 shares of stock. From the tenor of the letter, the Court finds that the checks transmitted were those given him by the ultimate purchasers and were not checks of Bruce Wallace Associates. Mr. Wallace in his letter specified that the stock certificates were to be issued as follows, and he then named nineteen individuals, including himself, as the persons in whose names certificates should be issued, and stated the denomination of the certificate for each. He also stated in his letter "on the strength of these subscriptions, think we could have sold another 100,000 shares." Defendant Custer replied to this letter under date of June 26, 1963. He returned checks amounting

to $10,050.00, describing them as the checks "I talked with you about * * * which cannot be accepted by this Corporation." Defendant Custer stated that he was retaining Mr. Wallace's personal check in the amount of $3,500.00 and a check of Mr. Cornelson which had been transmitted in the June 22 letter in the amount of $25,000.00. Following these statements, he then instructed Mr. Wallace. "Please handle this matter of the enclosed check as per our phone conversation, along with any additional friends who become part of the Bruce Wallace Associates in one personal check."

Other proof conclusively demonstrates that Mr. Cornelson was one who helped Bruce Wallace solicit subscriptions placed in the name of Bruce Wallace Associates. It is not without significance, therefore, that under dates of August 10, 1964 and September 9, 1964 defendant Custer wrote to Mr. Cornelson complaining in the letter of August 10, 1964, that when Mr. Cornelson left Hagerstown, defendant Custer had been under the impression that he was going to supply funds to meet the numerous bills coming due for engineering services for the aircraft, but that Mr. Cornelson had not produced any funds and, further complaining, in the letter of September 9, 1964, that at the directors meeting held August 21, 1964, everyone agreed that defendant Custer should proceed with expenditures to get the aircraft certificated, but that money to meet obligations falling due was not forthcoming. Apparently, the difficulties defendant Custer had with raising money were continuous, because, in an undated memorandum to all directors, which referred to a previous letter under date of April 6, 1964, defendant Custer had written at length about his need for money to continue the program of development of the aircraft, and concluded by saying, "I hope all of you realize this is not a request for any Director to put up any money, it is an urgent appeal for my Directors, as well as myself,

to find someone with this money, that will invest with us to help carry this project to a conclusion."

After his letter of June 22, 1963, Mr. Wallace continued to write defendant Custer in terms which unquestionably would make clear to him that Bruce Wallace Associates was a conduit through which stock was purchased by outsiders. Under date of April 6, 1964, Mr. Wallace wrote to transmit an investment letter for 63,800 shares of stock. He stated that he would like to have "several of these certificates for 500 shares each, as I have a few investors who have put in only $150.00 each." By letter dated June 4, 1964 he referred to "the Checks I have sent recently for which no stock has been issued" and suggested that the stock be issued in 1,000 share certificates "with 2 at $100 each for which a man purchased for his 2 sons." In an apparent reference to the total number of shares which were to be forwarded to him as a result of the transactions set out in the letter, Mr. Wallace concluded by saying, "with Waymans and my stock on hand we can use that to give to *our customers* without waiting for a couple of months to get it * * *." (emphasis supplied).

Defendant Custer, and through him Channel Wing, was as much on notice of the true modes of operation of Ward Brooks Associates as the documentary proof shows was the fact in regard to J. Ben Parent Associates and Bruce Wallace Associates. Thus, when defendant Custer wrote Mr. Brooks under date of October 3, 1963 to advise him that stock was authorized to be issued, defendant Custer stated all materials were furnished at The Corporation Trust Company and "* * * the stock certificates for *all your friends* should be coming to you in less than ten days." (emphasis supplied).

Should the documentary proof admit of any doubt (which the Court finds it does not) that defendant Custer knew the true nature of the activities of the Associates,

there was evidence that defendant Custer referred at least two purchasers to Bruce Wallace Associates to obtain stock.

Charles R. Lancaster, a resident of Sarasota, Florida, appeared as a witness and testified that he met defendant Custer in Hagerstown, Maryland in 1961, and again in 1964. On the latter occasion Lancaster inquired if stock was available, and defendant Custer told him that Bruce Wallace would know if stock was available. Defendant Custer gave Mr. Lancaster Mr. Wallace's address: Youngblood Hotel, Enid, Oklahoma. By letter dated September 9, 1964 Mr. Lancaster wrote and asked if he could obtain stock through Bruce Wallace Associates as suggested to him at a recent meeting with defendant Custer in Hagerstown, Maryland. Magnanimously, Mr. Wallace responded that stock could be obtained, that the price had recently been raised to 35 cents per share, but that since Mr. Lancaster had talked to Mr. Custer prior to the raise "we are still going to give you the old price of 25 cents per share." Mr. Wallace also added that the company was making rapid progress and would have complete certification of the aircraft early in 1965, at which time stock would be listed on the "board" at $3.00 per share.

Mr. T. B. Holliday, of Elmhurst, Illinois, also testified. He had been employed as a consultant for Channel Wing in connection with the interest evidenced by the United States Air Force in obtaining information about the plane that Channel Wing hoped to manufacture. Late in 1963, Mr. Holliday inquired of defendant Custer if the former could obtain Channel Wing stock. Mr. Custer "carefully emphasized that he couldn't have anything to do with stock" but gave Mr. Holliday the name of Mr. Sam Stoner and Bruce Wallace Associates. Under date of December 30, 1963, Mr. Holliday wrote to Mr. Stoner asking if he could convert a fee due him from Channel Wing into stock, as well as purchase some additional stock for a check for $200.00 enclosed in his letter. Mr. Stoner replied promptly,

stating that he had talked to defendant Custer and that the check and the unpaid fee could be converted into stock. Mr. Stoner indicated that a certificate for the stock would be forthcoming at a future date.

-V-

Other than defendant Custer's denial of his knowledge of essential facts constituting a violation of the injunction in regard to sales to the "Associates," which the Court finds neither convincing nor sufficient to raise a reasonable doubt of the fact of defendant Custer's actual knowledge. in this regard, defendant Custer asserts, as a defense, that he was advised by counsel that the overall sales which were made did not amount to a public offering, and that in good faith he relied on such advice. He testified that he was advised by his brother that if an investment letter were used, transfer of the stock restricted, and sales of stock limited to approximately fifteen to twenty people, there would be no public offering of the sale and no violation of the injunction. Defendant Custer's brother died, and was succeeded in the role of adviser to defendant Custer and Channel Wing by Keith L. Seegmiller, Esq., one of Cecil Custer's partners and one of counsel in these proceedings. Mr. Seegmiller advised defendant Custer that sales could not exceed six to eight purchasers in order to comply with the injunction. Other witnesses testified that they had been advised by Cecil Custer in regard to the formation and operation of the "Associates." Consistent with his claim that he knew nothing about the mode of operation of the Associates, defendant Custer offered no testimony on this point, except that he learned about the time these proceedings were instituted that J. Ben Parent had been advised to limit the number of persons subscribing to stock through J. Ben Parent Associates to six to fifteen in number. From the evidentiary basis, defendant Custer asserts that he acted on advice of counsel in good faith.

There are at least two answers to this alleged defense. The first is that, as a factual matter, even treating repeated sales to the "Associates" as no more than sales to three entities and repeated sales to the same individuals as only one sale, defendant Custer did not stay within the advice given him by his brother with regard to the number of purchasers. Rather, with this method of computation, he expressly authorized the sale and issuance of stock to twenty-two persons. The precise date on which defendant Custer was first advised by Mr. Seegmiller is not disclosed in the record, so that it may well be that defendant Custer had authorized sales to persons in number exceeding the maximum advised by Mr. Seegmiller by the time that Mr. Seegmiller first gave such advice, but the record shows that three sales were made in 1965, and it seems clear from the record that defendant Custer had the advice of Mr. Seegmiller at or shortly after a directors' meeting held in November, 1964. As a fact, the Court finds that defendant Custer, and through him Channel Wing, did not rely in good faith upon any advice of counsel.

The second answer to the alleged defense is that the Court has already found that in the case at bar wilfulness may be proved by showing knowledge of each of the essential elements of the violation and does not require proof of specific intent. Any defense of good faith reliance on advice of counsel has bearing upon only specific intent, and not general intent. *Linden* v. *United States,* 254 F.2d 560 (4 Cir. 1958); *Miller* v. *United States,* 277 F. 721 (4 Cir. 1921); *Bisno* v. *United States,* 299 F.2d 711 (9 Cir. 1961). In a proper case, good faith, or good faith reliance on advice of counsel, is a factor to be considered in mitigating of punishment, *Lustgarten* v. *Felt & Turrant Mfg. Co,* 92 F.2d 277 (3 Cir. 1937); *In re LaVarre,* 48 F.2d 216 (S.D. Ga. 1930).

For the reasons stated, the Court finds each of the defendants guilty of criminal contempt as charged.

United States District Judge

[Filed November 12, 1965]

Order of Court

This cause having come on for hearing on Application of the United States of America, for an Order directing Defendants to show cause why they should not be adjudged in Criminal Contempt of this Court for failure to comply with the Final Judgment dated May 25, 1962, filed in Civil Action No. 13500, and, the matter of Criminal Contempt having been tried before the Court, and Counsel for all parties having been heard, and the Court have filed an Opinion, containing its findings of fact and conclusions of law, and, finding both Defendants "Guilty" of Criminal Contempt, it is

ORDERED, by the United States District Court for the District of Maryland, this 12th day of November, 1965, that the Defendant, Custer Channel Wing Corporation, pay a fine of Five Thousand Dollars ($5,000.00) and ½ United States Costs, and, that the Defendant, Willard R. Custer is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One Hundred Eighty-three days (183), and to pay ½ United States costs of case; service of sentence as to Defendant Willard R. Custer, to begin on Monday, November 22, 1965, at 8:30 a.m. Custer Channel Wing Corporation—½ United States Costs, $3,512.25. Willard R. Custer—½ United States costs, $3,512.25.

IT IS ORDERED that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the Defendant, Willard R. Custer.

/s/ HARRISON L. WINTER
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1347

CUSTER CHANNEL WING CORPORATION, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, Custer Channel Wing Corporation ("Channel Wing") and Willard R. Custer, its president and a director, were found guilty of criminal contempt by the United States District Court for the District of Maryland (Pet. App. 53a) for violating a 1962 injunction (see Pet. App. 16a) restraining them from selling the capital stock of Channel Wing without compliance with the registration requirements of the Securities Act of 1933 (A. 4–6).[1] Channel Wing

[1] "A." refers to petitioners' appendix in the court of appeals; "R." refers to the appendix for the United States in the court of appeals; "T." refers to the transcript of hearing before the district court.

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was fined $5,000 and Custer was ordered imprisoned for 183 days (Pet. App. 53a). The court of appeals affirmed (Pet. App. 15a). Petitioners contend that the activities found to violate the injunction fell within an exemption from registration contained in Section 4(2) of the Securities Act, 15 U.S.C. 77d(2), for "transactions by an issuer not involving any public offering."

Subsequent to the injunction petitioners offered shares of Channel Wing stock to over 230 persons, selling over 1,500,000 shares to at least 163 persons scattered throughout the country (R. 36–50, 55–61, 69–70, 72–76; Pet. App. 17a, n. 1). Although more than half of the shares sold were issued in the names of three "associates", these were found to be merely "names [which] were used as conduits" for stock sales to 136 actual purchasers (Pet. App. 19a). In addition, shares were sold directly to 27 other individuals (Pet. App. 17a). Only one of all these purchasers had any association with Channel Wing other than as an investor (R. 21).

In *Securities and Exchange Commission* v. *Ralston Purina Co.*, 346 U.S. 119, 124–126, the Court held that the so-called "private offering exemption" is available only when the party claiming it sustains the burden of showing that those persons to whom the stock was offered had "access to the same kind of information that the Act would make available in the form of a registration statement."[2] Here it was found that none of the purchasers of Channel Wing

[2] See also *Gilligan, Will & Co.* v. *Securities and Exchange Commission*, 267 F. 2d 461 (C.A. 2).

stock had access to that kind of information (Pet. App. 3a, 27a). The court below held that the alleged "sophistication" of the purchasers was not a substitute for "access to the kind of information which registration would disclose" (Pet. App. 3a), and that petitioners' reliance upon its use of investment letters and restrictions upon further transfers of the stock subsequent to the illegal sales was misplaced (Pet. App. 5a–6a). Such measures, the court of appeals concluded, were insufficient "to constitute the Channel Wing offering a private one in the absence of proof that the purchasers actually had access to the kind of information that a registration statement would have disclosed" (Pet. App. 6a).

The detailed statement of the facts in the district court's opinion (Pet. App. 15a–20a, 22a, 23a, 25a, 41a–52a) and the well-reasoned analyses of the precedents in that opinion (Pet. App. 21a–52a) and in the court of appeals' opinion (Pet. App. 3a–14a) make clear that the instant petition presents no issue warranting review. No question of first impression is involved here; nor is the decision below one which is "probably in conflict with applicable decisions of this Court" (Pet. 4). Both the scope of the statute and the import of the injunction were clear. As the court of appeals noted (Pet. App. 12a): "The injunction pointedly brought to the defendants' attention their past infraction of the Securities Act and laid down a specific admonitory prescription to guide their future course."[3] The court of appeals sustained the district

[3] In contrast to this sort of "specific admonitory prescription," *Connally* v. *General Construction Co.*, 269 U.S. 385, relied upon by petitioners (Pet. 4), was concerned with the construction of an ambiguous State wage-and-hour statute.

court's finding that the evidence demonstrated beyond a reasonable doubt that petitioners had full knowledge of the acts which violated the injunction and participated in such acts intentionally. The court of appeals stated: "The facts cannot possibly be fitted into the pattern of an innocent stumbling into an unintended transgression" (Pet. App. 12a). In these circumstances, the alleged violations were amply proved and petitioners' convictions were proper.

Petitioners also contend that the sentence of the individual petitioner to imprisonment for 183 days, there having been no jury trial, violates the principle this Court enunciated in *Cheff* v. *Schnackenberg,* 384 U.S. 373. This issue was not raised in the court of appeals, even though this case was before that court after the decision in *Cheff*. Accordingly, the point does not appear to be open here.[4] This issue was considered by the district court, on petitioners' motion for a reduction of penalty, after certiorari was granted in *Cheff*. The district court noted that if its sentence were reduced to less than 180 days, the individual petitioner would be ineligible for parole (T. 1599, 1603–1605), since 18 U.S.C. 4202 requires that confinement be for a definite term of more than 180 days

[4] In any event, no conflict with the *Cheff* case is necessarily involved, since a sentence of 183 days would not automatically exceed six months. Whether it would or not depends upon the date confinement begins. Any confinement of 183 days beginning in March, May, July, or most of August would not exceed six months.

for such eligibility.[5] Following this observation by the district court, petitioners' counsel withdrew the motion for a reduction of penalty (T. 1600–1601). Imposition of the 183-day sentence thus did not constitute an abuse of discretion.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

PHILIP A. LOOMIS, JR.,
General Counsel,
Securities and Exchange Commission.

MAY 1967.

[5] See also 18 U.S.C. 4161, which provides an allowance for good conduct only "if the sentence is not less than six months * * *."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CUSTER CHANNEL WING CORPORATION
and WILLARD R. CUSTER,
Petitioners,

v.

UNITED STATES OF AMERICA

Our Petition for a Writ of Certiorari

PETITION FOR REHEARING

KEITH L. SEEGMILLER
Premier Building
1725 Eye Street, N.W.
Washington, D. C. 20006
Counsel for Petitioners

Of Counsel:

VINCENT L. GINGERICH
7000 Carroll Avenue
Takoma Park, Maryland 20012

November 1967

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IN THE

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OCTOBER TERM, 1966

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CUSTER CHANNEL WING CORPORATION
and WILLARD R. CUSTER,
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v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

Come now the Petitioners in the above identified case, by their undersigned counsel, and petition for a reconsideration of the denial of certiorari in this case in the light of the Court's consideration of and action upon a related petition for certiorari now pending in the case of *Royal American Industries, Inc., et al.* v. *Murphy*, No. 566, October Term 1967. The petition in the Royal American case was filed on September 1, 1967 and presumably had not been finally considered by the Court at the time of denial of the petition in the instant case on October 9, 1967.

The present case and the Royal American case present similar questions involving construction of an exemption from the Securities Act of 1933, as amended, of "'transactions by an issuer not involving a public offering." 15

U.S.C. Sect. 77d(1) (1958), as amended, 15 U.S.C. 77d (2) (1964).

It is respectfully submitted that the similarity of the questions presented by these two cases warrants reconsideration of the present case in the light of the Court's consideration of and action upon the petition in the Royal American case.

KEITH L. SEEGMILLER
Premier Building
1725 Eye Street, N.W.
Washington, D. C. 20006
Counsel for Petitioners

Of Counsel:

VINCENT L. GINGERICH
7000 Carroll Avenue
Takoma Park, Maryland 20012

November 1967

CERTIFICATE OF COUNSEL

I, Keith L. Seegmiller, one of the counsel for the Petitioners in the above entitled case, hereby certify that the foregoing Petition For Rehearing is presented in good faith and not for delay.

KEITH L. SEEGMILLER
Premier Building
1725 Eye Street, N.W.
Washington, D. C. 20006
Counsel for Petitioners